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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

JULIUS HYMAN, *Petitioner,*

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, HELEN A. REGENSTEIN, BETTY R. HARTMAN AND JOSEPH REGENSTEIN, JR., CO-EXECUTORS OF THE ESTATE OF JOSEPH REGENSTEIN, DECEASED,

Respondents.

Reply of Julius Hyman, Petitioner.

Petitioner hereby replies to the Respondents' Answer to Petitioner's Petition for Writ of Certiorari.

The basic fallacies contained in the Respondents' Answer are these:

1. They disregard the vital fact that the cause of action and the thing sued for here are entirely different from the causes of action and the things sued for in the earlier suits.

2. They disregard the vital fact that there is no identity of parties in this cause with the parties in the earlier suits. In only one of the earlier suits—the recapitalization case—was Regenstein even a formal party. That suit was a derivative action in which Hyman sued the directors of Velsicol Corporation to enjoin the carrying out of a plan of recapitalization. (See opinion of Appellate Court of

Illinois 342 Ill.App. 489, 97 N.E.2d 122). Here, Hyman sued Regenstein personally for an accounting, not arising out of the recapitalization of the corporation, but arising out of the relationship of the parties as fiduciaries and joint venturers. Thus, the "fourth identity"—namely, identity of the quality of the party was not present. (See App. B, p. B-6)

3. They disregard the vital fact that the decision of the Court of Appeals is in direct conflict with the decisions of this Court and many Courts of Appeals; and they, on the other hand, argue the evidence in the case. Our Petition for Certiorari set forth three questions earnestly believed worthy of review by this Court under the principles of Rule 19 (b), and not because of a "fight to the bitter end." If the writ be granted to resolve these legal questions, a more extended discussion of the evidence may then be appropriate. We stated only the facts in our Petition material to a determination of whether there should be a review (Rule 23c). (See Pet. for Cert. 4-8)

With respect to the first question presented the critical fact is that both the District Court and the Court of Appeals ignored the testimony to prove perjury in the former proceedings, discovered long after the earlier litigation had ended, and held that a finding in the earlier lawsuits that Hyman had executed an agreement to assign all of his future inventions was conclusively binding (App. A, p. A-16). In other words the Court of Appeals held there was an estoppel by judgment which precluded an attack on the prior finding. This holding is contrary to the equitable principles enunciated in *Marshall* v. *Holmes*, 141 U.S. 589 and *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238; but is consistent with *U. S.* v. *Throckmorton*, 98 U.S. 61.

Respondents argue (Ans. p. 7) that this is not a bill of review nor an action to restrain enforcement of judgment, and therefore that equitable principles regarding attacking a judgment are not applicable.

In the *Hazel-Atlas Glass* case, where perjury was involved, this Court observed, "But whatever the form of relief has taken in particular cases the net result in every case has been the same: where the situation has required, the Court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away".

The form of relief sought here, namely, avoidance of an estoppel by judgment in a case involving different parties and different causes of action, is much less drastic than a suit between the same parties to restrain enforcement of a judgment or to open up a judgment by bill of review.

Therefore, the essential point is that the Court of Appeals erred in holding that the doctrine of estoppel by judgment foreclosed any attempt to prove perjury.

With respect to the second question presented the critical fact is that the ruling of the Court of Appeals on the question of privity—an essential finding to sustain the Respondents' contention of collateral estoppel by judgment—ignored Regenstein's reversal of position. In the earlier cases Regenstein personally had been shielded successfully by the corporation when Hyman had sought to attach to the corporation promises and actions of Regenstein. His success in sustaining that view is explicitly shown in the statement of the Supreme Court of Colorado quoted on page 11 of the Petition for Certiorari.

And thus, the ruling of the Court of Appeals is in direct conflict with *Davis* v. *Wakelee*, 156 U.S. 680 and many decisions of the Courts of Appeals (Pet. for Cert. p. 12).

With the respect to the third question presented the critical fact is that the Court of Appeals in effect held that where a corporation is employed as the vehicle for a joint enterprise between two fiduciaries who take shares of stock for their interests, the rights of the parties are thereafter to be determined solely on the basis of an arm's length relationship of shareholder to shareholder (see Pet. for Cert. p. 12). The case cited by the Court of Appeals and by the Respondents against petitioner's joint venture contention is *Burnet* v. *Leininger*, 285 U.S. 136. That case was an income tax case involving a husband and wife partnership and the holding of the case was that the agreement between the husband and wife constituted an equitable assignment of income and that the attempted avoidance of tax to the husband could not stand. The Court of Appeals chose not to discuss *Beardsley* v. *Beardlsey*, 138 U.S. 262; *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483; or *Pepper* v. *Litton*, 308 U.S. 295, nor have the Respondents in their Answer, although those cases are cases which deal with equitable principles overriding legal corporate techniques.

CONCLUSION

We again respectfully submit that the three questions presented by the Petition for Certiorari come within Rule 19 (b) and that this Court should grant a review of the judgment of the United States Court of Appeals for the Fifth Circuit.

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February, 1959.